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Supreme Court, U.S.
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No. 00-1497

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY ARGUMENT

In the Brief for the United States in Opposition, the Acting Solicitor General[1] claims that this case is ". . . a poor vehicle for addressing any of the broader complaints made by petitioner about the current state of the law." U.S. br. at 10, 11, 18. With that single statement, the government brushes aside the important issues raised by Yonkers addressing the circumstances in which a district court may impose a race-based remedy. The Acting Solicitor General claims this case is a "poor vehicle" because of "petitioner's repeated failure to comply with the prior remedial orders." U.S. br. at 10. But, the district court never made such a finding to support entry of the racial classification. Nor does the government point to anything in the trial court record demonstrating that the City resisted implementation of a program that it fought so hard for in the negotiation of the 1996 order. The record below simply does not support the government's naked assertion.

The district court entered the order below because it was not satisfied with the result that some beneficiaries of the City's housing program were white, not because of some "failure [by Yonkers] to comply with prior remedial orders." As Yonkers acknowledges in its petition, it did fail to comply with earlier remedial orders in the late 1980's. Pet. at 21. As a result, it lost control over the remedy to court-appointed agents and suffered a damaging contempt proceeding.

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1. The U.S. Brief was filed by the Acting Solicitor General (together with the Acting Assistant Attorney General for Civil Rights) on May 29, 2001, some five days after Theodore Olson was confirmed by the Senate as Solicitor General. Unfortunately, this Court does not have the benefit of the views of the President's duly-appointed Solicitor General.

Pet. at 5, 6. Yonkers has moved beyond that and in 1996 the district court correctly returned control over the remedy to the City. The record below conclusively demonstrates how the City aggressively addressed the opportunity to effectuate a remedy so that this unfortunate chapter in its history could be closed. The undisputed facts demonstrate that Yonkers facilitated hundreds of units of affordable housing in the target neighborhoods — over 70% of which were occupied by minority families. Pet. at 8.

The real issue is whether *any* non-minority families may receive benefits flowing from a remedy that employs race-neutral selection criteria. The NAACP urged the district court to adopt a strict racial exclusion — effectively a 100% quota for minorities. Unlike the government, the NAACP forthrightly defends the position that it has consistently taken in the courts below — that because fifteen years ago Yonkers was found to have discriminated against blacks, "race-conscious remedies are not merely preferred — they are required." *See* NAACP br. at 4, 5. What the NAACP fails to acknowledge, however, is that the order it obtained does not benefit Priority 2 and 3 minority families that are identified victims of past discrimination, it simply prefers Priority 2 and 3 minority families solely on the basis of their race. If that is a legitimate goal, then it is correct that the original plan did not work. It is unlikely that a race-neutral program will ever achieve 100% minority participation. As urged by *amicus curiae* Center for Individual Rights, such a goal of outright racial balancing is beyond the authority of a federal court.

Contrary to the government's claim, this case presents a unique opportunity for this Court to address the circumstances in which a federal court may impose a racial

remedy. It also provides a vehicle for assessing the narrow tailoring prong of strict scrutiny. We believe it could serve as a companion case to *Adarand Constructors, Inc. v. Mineta*, *cert. granted*, No. 00-730 (March 26, 2001), which addresses a legislatively-approved racial classification.[2] This case not only raises the important question of a district court's authority to require race-based governmental conduct to racially balance local neighborhoods, but also the extent to which such conduct must be tailored to a lawful and compelling governmental interest.

CONCLUSION

Petitioner City of Yonkers requests that this Court grant its petition for writ of certiorari and vacate the judgments of the lower courts.

Respectfully submitted,

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2. While Yonkers respectfully urges this Court to grant certiorari and hear this case together with *Adarand*, should the Court decline that opportunity, this case should certainly be held and re-assessed after *Adarand* is decided.